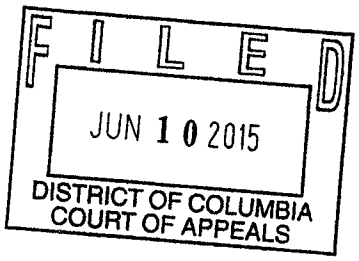
# District of Columbia
# Court of Appeals

No. M-242-12




**NOTICE**
(FILED – June 10, 2015)

In response to a proposal transmitted by the Board of Governors of the District of Columbia Bar, this court is considering whether to amend Rules 1.10, 1.15, and 7.1 of the District of Columbia Rules Professional Conduct and the comments thereto. With respect to those Rules and related comments, the court has decided to publish the Bar's proposals unchanged, except for the deletion of a sentence the Bar had proposed including at the beginning of new comment [6] to Rule 7.1. The full text of the amendments under consideration is available on this court's website at www.dcappeals.gov. Additional information about the Bar's proposal is available on the Bar's website at http://www.dcbar.org/about-the-bar/reports/rules-of-professional-conduct-review-committee/proposed-amendments-2012.cfm. Hard copies may be obtained by contacting LaJuan Evans at the District of Columbia Bar, at (202) 737-4700, extension 3341, or levans@dcbar.org.

This notice is published to afford interested parties an opportunity to submit written comments concerning the amendments under consideration. Ten copies of any comments should be addressed to the Clerk, D.C. Court of Appeals, 430 E Street, N.W., Washington, D.C. 20001 by August 10, 2015. All comments submitted pursuant to this notice will be available to the public.

# PROPOSED AMENDMENTS TO SELECTED RULES OF THE D.C. RULES OF PROFESSIONAL CONDUCT

## Clean and Red-lined Versions

**TABLE OF CONTENTS**

**District of Columbia Rules of Professional Conduct**
**Proposed Revisions to Rule 1.10 (Imputed Disqualification: General Rule)**

## Rule 1.10—Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

(1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or

(2) the representation is permitted by Rules 1.11, 1.12, or 1.18, or by paragraph (b) of this rule.

(b) (1) Except as provided in subparagraphs (2) and (3), when a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter.

(2) The firm is not disqualified by this paragraph if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.

(3) The firm is not disqualified by this paragraph if the prohibition is based upon Rule 1.9 and

(A) the disqualified lawyer is screened from the matter and is apportioned no part of the fee therefrom; and

(B) written notice is promptly given by the firm and the lawyer to any affected former client of the screened lawyer, such notice to include a description of the screening procedures employed and a statement of compliance with these Rules.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client who was represented by the formerly associated lawyer during the association and is not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) A lawyer who, while affiliated with a firm, is made available to assist the Office of the Attorney General of the District of Columbia in providing legal services to that agency is not considered to be associated in a firm for purposes of paragraph (a), provided, however, that no such lawyer shall represent the Office of the Attorney General with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

(f) If a client of the firm requests in writing that the fact and subject matter of a representation subject to paragraph (b) not be disclosed by submitting the written notice referred to in subparagraph (b)(3)(B), such notice shall be prepared concurrently with undertaking the representation and filed with Disciplinary Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the written notice previously prepared shall be promptly submitted as required by subparagraph (b)(3)(B).

**Comment**

**Definition of "Firm"**

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[2] There is ordinarily no question that the members of the law department of an organization constitute a firm within the meaning of the Rules of Professional Conduct, but there can be uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the

corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

**Principles of Imputed Disqualification**

[4] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the Rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraph (b) or (c).

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, see Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

**Exception for Personal Interest of the Disqualified Lawyer**

[7] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client's adversary is a person with whom one of the firm's lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm's lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney's Office) or with a law firm representing the opponent of a firm client.

**Lawyers Moving Between Firms**

[8] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[9] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[10] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impropriety can be taken to include any new client lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[11] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

**Confidentiality**

[12] Preserving confidentiality is a question of access to information. Access to information, in

turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[13] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[14] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict.

[15] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

**Adverse Positions**

[16] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the "second" hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment,* 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake,* 703 F.2d 252, 257-59 (7th Cir. 1983). An exception to paragraph (b) is provided by subparagraph (b)(3).

[17] The concept of "former client" as used in paragraph (b) extends only to actual representation of the client by the newly affiliated lawyer while that lawyer was employed by the former firm. Thus, not all of the clients of the former firm during the newly affiliated lawyer's practice there are necessarily deemed former clients of the newly affiliated lawyer. Only those clients with whom the newly affiliated lawyer in fact personally had a lawyer client relationship are former clients within the terms of paragraph (b).

[18] Subparagraph (b)(2) limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part time or summer law clerk, or so called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified subparagraph (b)(2). Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

[19] Under certain circumstances, paragraph (c) permits a law firm to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. The firm, however, may not represent a person in a matter adverse to a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same as, or substantially related to, that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rule 1.6.

[20] Subparagraph (b)(3) removes the imputation otherwise required by paragraphs 1.10(a) and (b), but does so without requiring informed consent by the former client of the lawyer changing firms. Instead, it requires that the procedures set out in subparagraphs (b)(3)(A) and (B) be followed. The term "screened" is defined in Rule 1.0(l) and explained in comments [4]-[6] to Rule 1.0. Lawyers should be aware, however, that even where subparagraph 1.10(b)(3) has been followed, tribunals in other jurisdictions may consider additional factors in ruling upon motions to disqualify lawyers from pending litigation. Establishing a screen under this rule does not constitute dropping an existing client in favor of another client. Cf. D.C. Legal Ethics Op. 272 (1997) (permitting lawyer to drop occasional client for whom lawyer is handling no current projects in order to accept conflicting representation).

[21] Subparagraph (b)(3)(A) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter from which the screened lawyer is disqualified. See D.C. Legal Ethics Op. 279 (1998).

[22] The written notice required by subparagraph (b)(3)(B) generally should include a description of the screened lawyer's prior representation and an undertaking by the new law firm to respond promptly to any written inquiries or objections by the former client regarding the screening procedures. The notice should be provided as soon as practicable after the need for

screening becomes apparent. It also should include a statement by the screened lawyer and the new firm that the screened lawyer's former client's confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the screened lawyer's former client to evaluate and comment upon the effectiveness of the screening procedures. Nothing in this rule is intended to restrict the firm and the screened lawyer's former client from agreeing to different screening procedures but those set out herein are sufficient to comply with the rule.

[23] Paragraph (f) makes it clear that a lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by subparagraph (b)(3)(b). If a client requests in writing that the fact and subject matter of the representation not be disclosed, the screened lawyer and law firm must comply with that request. If a client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading that is publicly available or making an appearance in a proceeding before a tribunal that is open to the public constitutes a public filing for purposes of this rule. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client's request not to make the notifications.

[24] Although paragraph (f) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the screened lawyer and the screened lawyer's new firm to prepare the documents described in paragraph (f) as soon as the representation commences, to file the documents with Disciplinary Counsel, and to preserve the documents for possible submission to the screened lawyer's former client if and when the client does consent to their submission or the information becomes public.

[25] The responsibilities of partners, managers, and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply in respect of screening arrangements under Rule 1.10(b)(3).

**Lawyers Assisting the Office of the Attorney General of the District of Columbia**

[26] The Office of the Attorney General of the District of Columbia may experience periods of peak need for legal services which cannot be met by normal hiring programs, or may experience problems in dealing with a large backlog of matters requiring legal services. In such circumstances, the public interest is served by permitting private firms to provide the services of lawyers affiliated with such private firms on a temporary basis to assist the Office of the Attorney General. Such arrangements do not fit within the classical pattern of situations involving the general imputation rule of paragraph (a). Provided that safeguards are in place which preclude the improper disclosure of client confidences or secrets, and the improper use of one client's confidences or secrets on behalf of another client, the public interest benefits of such arrangements justify an exception to the general imputation rule, just as Comment [1] excludes from the definition of "firm" lawyers employed by a government agency or other government entity. Lawyers assigned to assist the Office of the Attorney General pursuant to such temporary programs are, by virtue of paragraph (e), treated as if they were employed as government

employees and as if their affiliation with the private firm did not exist during the period of temporary service with the Office of the Attorney General. See Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[27] The term "made available to assist the Office of the Attorney General in providing legal services" in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to the Office of the Attorney General, so that during that period the lawyer's activities which involve the practice of law are devoted fully to assisting the Office of the Attorney General.

[28] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer's firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[29] The absence of such a per se prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public's acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer's law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer's firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer's firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer's representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer's firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[30] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer's zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will

generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

**District of Columbia Rules of Professional Conduct**
**Proposed Revisions to Rule 1.10 (Imputed Disqualification: General Rule)**

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**; proposed deletions: strike-through, as in ~~deleted~~.]

**Rule 1.10—Imputed Disqualification: General Rule**

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless:

(1) the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm; or

(2) the representation is permitted by Rules 1.11, 1.12, or 1.18**, or by paragraph (b) of this rule**.

(b)**(1) Except as provided in subparagraphs (2) and (3), when** ~~When~~ a lawyer becomes associated with a firm, the firm may not knowingly represent a person in a matter which is the same as, or substantially related to, a matter with respect to which the lawyer had previously represented a client whose interests are materially adverse to that person and about whom the lawyer has in fact acquired information protected by Rule 1.6 that is material to the matter.

**(2)** The firm is not disqualified **by this paragraph** if the lawyer participated in a previous representation or acquired information under the circumstances covered by Rule 1.6(h) or Rule 1.18.

**(3) The firm is not disqualified by this paragraph if the prohibition is based upon Rule 1.9 and**

**(A) the disqualified lawyer is screened from the matter and is apportioned no part of the fee therefrom; and**

**(B) written notice is promptly given by the firm and the lawyer to any affected former client of the screened lawyer, such notice to include a description of the screening procedures employed and a statement of compliance with these Rules.**

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client who was represented by the formerly associated lawyer during the association and is not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rule 1.6 that is material to the matter.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) A lawyer who, while affiliated with a firm, is made available to assist the Office of the Attorney General of the District of Columbia in providing legal services to that agency is not considered to be associated in a firm for purposes of paragraph (a), provided, however, that no such lawyer shall represent the Office of the Attorney General with respect to a matter in which the lawyer's firm appears on behalf of an adversary.

**(f) If a client of the firm requests in writing that the fact and subject matter of a representation subject to paragraph (b) not be disclosed by submitting the written notice referred to in subparagraph (b)(3)(B), such notice shall be prepared concurrently with undertaking the representation and filed with Disciplinary Counsel under seal. If at any time thereafter the fact and subject matter of the representation are disclosed to the public or become a part of the public record, the written notice previously prepared shall be promptly submitted as required by subparagraph (b)(3)(B).**

**Comment**

**Definition of "Firm"**

[1] Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. *See* Rule 1.0(c). For purposes of this rule, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation, legal services organization, or other organization, but does not include a government agency or other government entity. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to confidential information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[2] There is ordinarily no question that the members of the law department of an organization constitute a firm within the meaning of the Rules of Professional Conduct, but there can be

uncertainty as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[3] Similar questions can also arise with respect to lawyers in legal aid organizations. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular Rule that is involved, and on the specific facts of the situation.

**Principles of Imputed Disqualification**

[4] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the Rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by paragraph (b) or (c).

[5] Where an individual lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (j) of that Rule, and not this Rule, governs whether that prohibition applies also to other lawyers in a firm with which that lawyer is associated. For issues involving prospective clients, see Rule 1.18.

[6] Where a lawyer has joined a private firm after having represented the government, the situation is governed by Rule 1.11.

~~[7] Different provisions are thus made for movement of a lawyer from one private firm to another and for movement of a lawyer from the government to a private firm. The government is entitled to protection of its client confidences, and therefore to the protections provided in Rules 1.6 and 1.11. Nevertheless, if the more extensive disqualification in Rule 1.10 were applied to former government lawyers, the potential effect on the government would be unduly burdensome. The government deals with all private citizens and organizations, and thus has a much wider circle of adverse legal interests than does any private law firm. In these circumstances, the government's recruitment of lawyers would be seriously impaired if Rule 1.10 were applied to the government. On balance, therefore, the government is better served in the long run by the protections stated in Rule 1.11.~~

**Exception for Personal Interest of the Disqualified Lawyer**

[~~8~~ 7] The rule in paragraph (a) does not prohibit representation by the firm where neither questions of client loyalty nor protection of confidential information are presented. Where an individual lawyer could not effectively represent a given client because of an interest described in Rule 1.7(b)(4), but that lawyer will do no work on the matter and the disqualifying interest of

the lawyer will not adversely affect the representation by others in the firm, the firm should not be disqualified. For example, a lawyer's strong political beliefs may disqualify the lawyer from representing a client, but the firm should not be disqualified if the lawyer's beliefs will not adversely affect the representation by others in the firm. Similarly, representation of a client by the firm would not be precluded merely because the client's adversary is a person with whom one of the firm's lawyers has longstanding personal or social ties or is represented by a lawyer in another firm who is closely related to one of the firm's lawyers. *See* Rule 1.7, Comment [12] and Rule 1.8(h), Comment [7], respectively. Nor would representation by the firm be precluded merely because one of its lawyers is seeking possible employment with an opponent (*e.g.*, U.S. Attorney's Office) or with a law firm representing the opponent of a firm client.

**Lawyers Moving Between Firms**

[~~9~~ **8**] When lawyers move between firms or when lawyers have been associated in a firm but then end their association, the fiction that the law firm is the same as a single lawyer is no longer wholly realistic. There are several competing considerations. First, the client previously represented must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule of disqualification should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule of disqualification should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association, or unreasonably hamper the former firm from representing a client with interests adverse to those of a former client who was represented by a lawyer who has terminated an association with the firm. In this connection, it should be recognized that today many lawyers practice in firms, that many to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputed disqualification were defined with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

[~~10~~ **9**] Reconciliation of these competing principles in the past has been attempted under two rubrics. One approach has been to seek *per se* rules of disqualification. For example, it has been held that a partner in a law firm is conclusively presumed to have access to all confidences concerning all clients of the firm. Under this analysis, if a lawyer has been a partner in one law firm and then becomes a partner in another law firm, there is a presumption that all confidences known by a partner in the first firm are known to all partners in the second firm. This presumption might properly be applied in some circumstances, especially where the client has been extensively represented, but may be unrealistic where the client was represented only for limited purposes. Furthermore, such a rigid rule exaggerates the difference between a partner and an associate in modern law firms.

[~~11~~ **10**] The other rubric formerly used for dealing with vicarious disqualification is the appearance of impropriety proscribed in Canon 9 of the Code of Professional Responsibility. Applying this rubric presents two problems. First, the appearance of impropriety can be taken to include any new client lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance

of impropriety" is question-begging. It therefore has to be recognized that the problem of imputed disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety.

[~~12~~ **11**] A rule based on a functional analysis is more appropriate for determining the question of vicarious disqualification. Two functions are involved: preserving confidentiality and avoiding positions adverse to a client.

**Confidentiality**

[~~13~~ **12**] Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions, or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

[~~14~~ **13**] Application of paragraphs (b) and (c) depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[~~15~~ **14**] The provisions of paragraphs (b) and (c) which refer to possession of protected information operate to disqualify the firm only when the lawyer involved has actual knowledge of information protected by Rule 1.6. Thus, if a lawyer while with one firm acquired no knowledge of information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a substantially related matter even though the interests of the two clients conflict.

[~~16~~ **15**] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rule 1.6.

**Adverse Positions**

[~~17~~ **16**] The second aspect of loyalty to a client is the lawyer's obligation to decline subsequent representations involving positions adverse to a former client arising in the same or substantially related matters. This obligation requires abstention from adverse representations by the individual lawyer involved, and may also entail abstention of other lawyers through imputed disqualification. Hence, this aspect of the problem is governed by the principles of Rule 1.9. Thus, under paragraph (b), if a lawyer left one firm for another, the new affiliation would preclude the lawyer's new firm from continuing to represent clients with interests materially adverse to those of the lawyer's former clients in the same or substantially related matters. In this

respect paragraph (b) is at odds with – and thus must be understood to reject – the dicta expressed in the "second" hypothetical in the second paragraph of footnote 5 of *Brown v. District of Columbia Board of Zoning Adjustment,* 486 A.2d 37, 42 n. 5 (D.C. 1984) (en banc), premised on *LaSalle National Bank v. County of Lake,* 703 F.2d 252, 257-59 (7th Cir. 1983). **An exception to paragraph (b) is provided by subparagraph (b)(3).**

[~~18~~ **17**] The concept of "former client" as used in paragraph (b) extends only to actual representation of the client by the newly affiliated lawyer while that lawyer was employed by the former firm. Thus, not all of the clients of the former firm during the newly affiliated lawyer's practice there are necessarily deemed former clients of the newly affiliated lawyer. Only those clients with whom the newly affiliated lawyer in fact personally had a lawyer client relationship are former clients within the terms of paragraph (b).

[~~19~~ **18**] ~~The last sentence of paragraph~~ **Subparagraph** (b)**(2)** limits the imputation rule in certain limited circumstances. Those circumstances involve situations in which any secrets or confidences obtained were received before the lawyer had become a member of the Bar, but during a time when such person was providing assistance to another lawyer. The typical situation is that of the part time or summer law clerk, or so called summer associate. Other types of assistance to a lawyer, such as working as a paralegal or legal assistant, could also fall within the scope of this sentence. The limitation on the imputation rule is similar to the provision dealing with judicial law clerks under Rule 1.11(b). Not applying the imputation rule reflects a policy choice that imputation in such circumstances could unduly impair the mobility of persons employed in such nonlawyer positions once they become members of the Bar. The personal disqualification of the former non-lawyer is not affected, and the lawyer who previously held the non-legal job may not be involved in any representation with respect to which the firm would have been disqualified ~~but for the last sentence of paragraph~~ **subparagraph** (b)**(2)**. Rule 1.6(h) provides that the former nonlawyer is subject to the requirements of Rule 1.6 (regarding protection of client confidences and secrets) just as if the person had been a member of the Bar when employed in the prior position.

[~~20~~ **19**] Under certain circumstances, paragraph (c) permits a law firm to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. The firm, however, may not represent a person in a matter adverse to a current client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same as, or substantially related to, that in which the formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rule 1.6.

**[20] Subparagraph (b)(3) removes the imputation otherwise required by paragraphs 1.10(a) and (b), but does so without requiring informed consent by the former client of the lawyer changing firms. Instead, it requires that the procedures set out in subparagraphs (b)(3)(A) and (B) be followed. The term "screened" is defined in Rule 1.0(l) and explained in comments [4]-[6] to Rule 1.0. Lawyers should be aware, however, that even where subparagraph 1.10(b)(3) has been followed, tribunals in other jurisdictions may consider additional factors in ruling upon motions to disqualify lawyers from pending litigation.**

Establishing a screen under this rule does not constitute dropping an existing client in favor of another client. Cf. D.C. Legal Ethics Op. 272 (1997) (permitting lawyer to drop occasional client for whom lawyer is handling no current projects in order to accept conflicting representation).

[21] Subparagraph (b)(3)(A) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter from which the screened lawyer is disqualified. See D.C. Legal Ethics Op. 279 (1998).

[22] The written notice required by subparagraph (b)(3)(B) generally should include a description of the screened lawyer's prior representation and an undertaking by the new law firm to respond promptly to any written inquiries or objections by the former client regarding the screening procedures. The notice should be provided as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the new firm that the screened lawyer's former client's confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the screened lawyer's former client to evaluate and comment upon the effectiveness of the screening procedures. Nothing in this rule is intended to restrict the firm and the screened lawyer's former client from agreeing to different screening procedures but those set out herein are sufficient to comply with the rule.

[23] Paragraph (f) makes it clear that a lawyer's duty, under Rule 1.6, to maintain client confidences and secrets may preclude the submission of any notice required by subparagraph (b)(3)(b). If a client requests in writing that the fact and subject matter of the representation not be disclosed, the screened lawyer and law firm must comply with that request. If a client makes such a request, the lawyer must abide by the client's wishes until such time as the fact and subject matter of the representation become public through some other means, such as a public filing. Filing a pleading that is publicly available or making an appearance in a proceeding before a tribunal that is open to the public constitutes a public filing for purposes of this rule. Once information concerning the representation is public, the notifications called for must be made promptly, and the lawyers involved may not honor a client's request not to make the notifications.

[24] Although paragraph (f) prohibits the lawyer from disclosing the fact and subject matter of the representation when the client has requested in writing that the information be kept confidential, the paragraph requires the screened lawyer and the screened lawyer's new firm to prepare the documents described in paragraph (f) as soon as the representation commences, to file the documents with Disciplinary Counsel, and to preserve the documents for possible submission to the screened lawyer's former client if and when the client does consent to their submission or the information becomes public.

[25] The responsibilities of partners, managers, and supervisory lawyers prescribed by Rules 5.1 and 5.3 apply in respect of screening arrangements under Rule 1.10(b)(3).

**Lawyers Assisting the Office of the Attorney General of the District of Columbia**

[~~21~~ **26**] The Office of the Attorney General of the District of Columbia may experience periods of peak need for legal services which cannot be met by normal hiring programs, or may experience problems in dealing with a large backlog of matters requiring legal services. In such circumstances, the public interest is served by permitting private firms to provide the services of lawyers affiliated with such private firms on a temporary basis to assist the Office of the Attorney General. Such arrangements do not fit within the classical pattern of situations involving the general imputation rule of paragraph (a). Provided that safeguards are in place which preclude the improper disclosure of client confidences or secrets, and the improper use of one client's confidences or secrets on behalf of another client, the public interest benefits of such arrangements justify an exception to the general imputation rule, just as Comment [1] excludes from the definition of "firm" lawyers employed by a government agency or other government entity. Lawyers assigned to assist the Office of the Attorney General pursuant to such temporary programs are, by virtue of paragraph (e), treated as if they were employed as government employees and as if their affiliation with the private firm did not exist during the period of temporary service with the Office of the Attorney General. See Rule 1.11(h) with respect to the procedures to be followed by lawyers participating in such temporary programs and by the firms with which such lawyers are affiliated after the participating lawyers have ended their participation in such temporary programs.

[~~22~~ **28**] The term "made available to assist the Office of the Attorney General in providing legal services" in paragraph (e) contemplates the temporary cessation of practice with the firm during the period legal services are being made available to the Office of the Attorney General, so that during that period the lawyer's activities which involve the practice of law are devoted fully to assisting the Office of the Attorney General.

[~~23~~ **29**] Rule 1.10(e) prohibits a lawyer who is assisting the Office of the Attorney General from representing that office in any matter in which the lawyer's firm represents an adversary. Rule 1.10(e) does not, however, by its terms, prohibit lawyers assisting the Office of the Attorney General from participating in every matter in which the Attorney General is taking a position adverse to that of a current client of the firm with which the participating lawyer was affiliated prior to joining the program of assistance to the Office of the Attorney General. Such an unequivocal prohibition would be overly broad, difficult to administer in practice, and inconsistent with the purposes of Rule 1.10(e).

[~~24~~ **30**] The absence of such a per se prohibition in Rule 1.10(e) does not diminish the importance of a thoughtful and restrained approach to defining those matters in which it is appropriate for a participating lawyer to be involved. An appearance of impropriety in programs of this kind can undermine the public's acceptance of the program and embarrass the Office of the Attorney General, the participating lawyer, that lawyer's law firm and clients of that firm. For example, it would not be appropriate for a participant lawyer to engage in a representation adverse to a party who is known to be a major client of the participating lawyer's firm, even though the subject matter of the representation of the Office of the Attorney General bears no substantial relationship to any representation of that party by the participating lawyer's firm. Similarly, it would be inappropriate for a participating lawyer to be involved in a representation adverse to a party that the participating lawyer has been personally involved in representing

while at the firm, even if the client is not a major client of the firm. The appropriate test is that of conservative good judgment; if any reasonable doubts concerning the unrestrained vigor of the participating lawyer's representation on behalf of the Office of the Attorney General might be created, the lawyer should advise the appropriate officials of the Office of the Attorney General and decline to participate. Similarly, if participation on behalf of the Office of the Attorney General might reasonably give rise to a concern on the part of a participating lawyer's firm or a client of the firm that its secrets or confidences (as defined by Rule 1.6) might be compromised, participation should be declined. It is not anticipated that situations suggesting the appropriateness of a refusal to participate will occur so frequently as to significantly impair the usefulness of the program of participation by lawyers from private firms.

[~~25~~ **31**] The primary responsibility for identifying situations in which representation by the participating lawyer might raise reasonable doubts as to the lawyer's zealous representation on behalf of the Office of the Attorney General must rest on the participating lawyer, who will generally be privy to nonpublic information bearing on the appropriateness of the lawyer's participation in a matter on behalf of the Office of the Attorney General. Recognizing that many representations by law firms are nonpublic matters, the existence and nature of which may not be disclosed consistent with Rule 1.6, it is not anticipated that law firms from which participating lawyers have been drawn would be asked to perform formal "conflicts checks" with respect to matters in which participating lawyers may be involved. However, consultations between participating lawyers and their law firms to identify potential areas of concern, provided that such consultations honor the requirements of Rule 1.6, are appropriate to protect the interests of all involved – the Office of the Attorney General, the participating lawyer, that lawyer's law firm and any clients whose interests are potentially implicated.

**District of Columbia Rules of Professional Conduct**
**Proposed Revisions to Rule 1.15 (Safekeeping of Property: General Rule)**

**Rule 1.15—Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed

consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

**Comment**

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in *In re Clower*, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.

[3] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[4] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[5] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[6] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[7] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties

from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[8] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[9] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[10] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

**District of Columbia Rules of Professional Conduct**
**Proposed Revisions to Rule 1.15 (Safekeeping Property)**

[Unmarked text is the current D.C. rule; proposed additions: **bold and double underscoring**; proposed deletions: strike-through, as in ~~deleted~~.]

**Rule 1.15—Safekeeping Property**

(a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds of clients or third persons that are in the lawyer's possession (trust funds) shall be kept in one or more trust accounts maintained in accordance with paragraph (b). Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after termination of the representation.

(b) All trust funds shall be deposited with an "approved depository" as that term is defined in Rule XI of the Rules Governing the District of Columbia Bar. Trust funds that are nominal in amount or expected to be held for a short period of time, and as such would not be expected to earn income for a client or third-party in excess of the costs incurred to secure such income, shall be held at an approved depository and in compliance with the District of Columbia's Interest on Lawyers Trust Account (DC IOLTA) program. The title on each DC IOLTA account shall include the name of the lawyer or law firm that controls the account, as well as "DC IOLTA Account" or "IOLTA Account." The title on all other trust accounts shall include the name of the lawyer or law firm that controls the account, as well as "Trust Account" or "Escrow Account." The requirements of this paragraph (b) shall not apply when a lawyer is otherwise compliant with the contrary mandates of a tribunal; or when the lawyer is participating in, and compliant with, the trust accounting rules and the IOLTA program of the jurisdiction in which the lawyer is licensed and principally practices.

(c) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property, subject to Rule 1.6.

(d) When in the course of representation a lawyer is in possession of property in which interests are claimed by the lawyer and another person, or by two or more persons to each of whom the lawyer may have an obligation, the property shall be kept separate by the lawyer until there is an accounting and severance of interests in the property. If a dispute arises concerning the respective interests among persons claiming an interest in such property, the undisputed portion shall be distributed and the portion in dispute shall be

kept separate by the lawyer until the dispute is resolved. Any funds in dispute shall be deposited in a separate account meeting the requirements of paragraph (a) and (b).

(e) Advances of unearned fees and unincurred costs shall be treated as property of the client pursuant to paragraph (a) until earned or incurred unless the client gives informed consent to a different arrangement. Regardless of whether such consent is provided, Rule 1.16(d) applies to require the return to the client of any unearned portion of advanced legal fees and unincurred costs at the termination of the lawyer's services in accordance with Rule 1.16(d).

(f) Nothing in this rule shall prohibit a lawyer from placing a small amount of the lawyer's funds into a trust account for the sole purpose of defraying bank charges that may be made against that account.

**Comment**

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts maintained with financial institutions meeting the requirements of this rule. This rule, among other things, sets forth the longstanding prohibitions of the misappropriation of entrusted funds and the commingling of entrusted funds with the lawyer's property. This rule also requires that a lawyer safeguard "other property" of clients, which may include client files. For guidance concerning the disposition of closed client files, *see* D.C. Bar Legal Ethics Committee Opinion No. 283.

**[2] Paragraph (a) of Rule 1.15 requires lawyers to keep "[c]omplete records of [client] funds and property. . . ." The D.C. Court of Appeals addressed the meaning of "complete records" in In re Clower, 831 A.2d 1030, 1034 (D.C. 2003): "The Rules of Professional Conduct should be interpreted with reference to their purposes. The purpose of maintaining 'complete records' is so that the documentary record itself tells the full story of how the attorney handled client or third-party funds and whether the attorney complied with his fiduciary obligation that client or third-party funds not be misappropriated or commingled. Financial records are complete only when documents sufficient to demonstrate an attorney's compliance with his ethical duties are maintained. The reason for requiring complete records is so that any audit of the attorney's handling of client funds by Disciplinary Counsel can be completed even if the attorney or the client, or both, are not available." Rule 1.15 requires that lawyers maintain records such that ownership or any other question about client funds can be answered without assistance from the lawyer or the lawyer's clients. The precise records that achieve this result obviously can vary, but lawyers may wish to look for guidance on records from the 2010 ABA Model Rules For Client Trust Account Records.**

[~~2~~ **3**] Paragraph (a) concerns trust funds arising from "a representation." The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[~~3~~ **4**] Paragraph (b) mandates where trust deposits shall be held and further mandates participation in the District of Columbia's IOLTA program. This paragraph is intended to reach every lawyer who is admitted in this jurisdiction regardless of where the lawyer practices, unless a stated exception applies. Thus, a lawyer should follow the contrary mandates of a tribunal regarding deposits that are subject to that tribunal's oversight. Similarly, if the lawyer principally practices in a foreign jurisdiction in which the lawyer is also licensed, and the lawyer maintains trust accounts compliant with that foreign jurisdiction's trust accounting rules, the lawyer may deposit trust funds to an approved depository or to a banking institution acceptable to that foreign jurisdiction. Finally, a lawyer is not obligated to participate in the District of Columbia IOLTA program if the lawyer is participating in, and compliant with, the IOLTA program in the jurisdiction in which the lawyer is licensed and principally practices. IOLTA programs are known by different names or acronyms in some jurisdictions; this rule and its exceptions apply to all such programs, however named. This rule anticipates that a law firm with lawyers admitted to practice in the District of Columbia may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions where firm lawyers principally practice. A lawyer who is not participating in the IOLTA program of the jurisdiction in which the lawyer principally practices because the lawyer has exercised a right to opt out of, or not to opt into, the jurisdiction's IOLTA program, or because the jurisdiction does not have an IOLTA program, shall not thereby be excused from participating in the District of Columbia's IOLTA program. To the extent paragraph (b) does not resolve a multi-jurisdictional conflict, see Rule 8.5. Nothing in this rule is intended to limit the power of any tribunal to direct a lawyer in connection with a pending matter, including a lawyer who is admitted *pro hac vice*, to hold trust funds as may be directed by that tribunal. For a list of approved depositories and additional information regarding DC IOLTA program compliance, see Rule XI, Section 20, of the Rules Governing the District of Columbia Bar, and the D.C. Bar Foundation's website www.dcbarfoundation.org.

[4 **5**] The exception to Rule 1.15(b) requires a lawyer to make a good faith determination of the jurisdiction in which the lawyer principally practices. The phrase "principally practices" refers to the conduct of an individual lawyer, not to the principal place of practice of his or her law firm (which might yield a different result for a lawyer with partners). For purposes of this rule, an individual lawyer principally practices in the jurisdiction where the lawyer is licensed and generates the clear majority of his or her income. If there is no such jurisdiction, then a lawyer should identify the physical location of the office where the lawyer devotes the largest portion of his or her time. In any event, the initial good faith determination of where the lawyer principally practices should be changed only if the lawyer's circumstances change significantly and the change is expected to continue indefinitely.

[~~5~~ **6**] The determination, under paragraph (b), whether trust funds are not expected to earn income in excess of costs, rests in the sound judgment of the lawyer. The lawyer should review

trust practices at reasonable intervals to determine whether circumstances require further action with respect to the funds of any client or third party. Because paragraph (b) is a lawyer-specific obligation, this rule anticipates that a law firm may be obligated to maintain accounts compliant with the IOLTA rules of other jurisdictions, to the extent the lawyers in that firm do not all principally practice in the District of Columbia.

[~~6~~ **7**] Paragraphs (c) and (d) recognize that lawyers often receive funds from third parties from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds should be promptly distributed.

[~~7~~ **8**] Third parties, such as a client's creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party. *See* D.C. Bar Legal Ethics Committee Opinion 293.

[~~8~~ **9**] Paragraph (e) permits advances against unearned fees and unincurred costs to be treated as either the property of the client or the property of the lawyer, but absent informed consent by the client to a different arrangement, the rule's default position is that such advances be treated as the property of the client, subject to the restrictions provided in paragraph (a). In any case, at the termination of an engagement, advances against fees that have not been incurred must be returned to the client as provided in Rule 1.16(d). For the definition of "informed consent," see Rule 1.0(e).

[~~9~~ **10**] With respect to property that constitutes evidence, such as the instruments or proceeds of crime, *see* Rule 3.4(a).

**District of Columbia Rules of Professional Conduct**
**Proposed Revisions to Rule 7.1 (Communications Concerning a Lawyer's Services)**

## Rule 7.1—Communications Concerning a Lawyer's Services

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or

(2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

(b) A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

(1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

(2) The solicitation involves the use of coercion, duress or harassment; or

(3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:

(1) Pay the reasonable costs of advertisements or communications permitted by this Rule;

(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;

(3) Pay for a law practice in accordance with Rule 1.17; and

(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:

(A) The reciprocal agreement is not exclusive, and

(B) The client is informed of the existence and nature of the agreement.

(d) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate,

or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

(e) No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.

(f) Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.,* in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

**Comment**

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

**Advertising**

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of limited means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

[3] This rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.*, a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (see Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

[6] Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4.

[7] A lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

**Payments for Advertising**

[8] A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

**Solicitations in the Vicinity of the District of Columbia Courthouse**

[9] Paragraph (e) is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph (e) as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

**Solicitations of Inmates**

[10] Paragraph (f) is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.

**District of Columbia Rules of Professional Conduct**
**Proposed Revisions to Rule 7.1 (Communications Concerning a Lawyer's Services)**

[Unmarked text is the current D.C. Rule; proposed additions: **bold text and double underscoring;** proposed deletions: a strike-through, as in ~~deleted~~]:

**Rule 7.1—Communications Concerning a Lawyer's Services**

(a) A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(1) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading; or

(2) Contains an assertion about the lawyer or the lawyer's services that cannot be substantiated.

(b) ~~(1)~~ A lawyer shall not seek by in-person contact, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

**(1)** ~~(A)~~ The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);

**(2)** ~~(B)~~ The solicitation involves the use of coercion, duress or harassment; or

**(3)** ~~(C)~~ The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer.

~~(2) A lawyer shall not give anything of value to a person (other than the lawyer's partner or employee) for recommending the lawyer's services through in-person contact.~~

**(c) A lawyer shall not pay money or give anything of material value to a person (other than the lawyer's partner or employee) in exchange for recommending the lawyer's services except that a lawyer may:**

**(1) Pay the reasonable costs of advertisements or communications permitted by this Rule;**

**(2) Pay the usual and reasonable fees or dues charged by a legal service plan or a lawyer referral service;**

**(3) Pay for a law practice in accordance with Rule 1.17; and**

**(4) Refer clients to another lawyer or nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:**

**(A) The reciprocal agreement is not exclusive, and**

**(B) The client is informed of the existence and nature of the agreement.**

**(d)** ~~(c)~~ A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, or vexatious or harassing conduct.

**(e)** ~~(d)~~ No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.

**(f)** ~~(e)~~ Any lawyer or person acting on behalf of a lawyer who solicits or invites or seeks to solicit any person incarcerated at the District of Columbia Jail, the Correctional Treatment Facility or any District of Columbia juvenile detention facility for the purpose of representing that person for a fee paid by or on behalf of that person or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) *et seq.*, in any then-pending criminal case in which that person is represented, must provide timely and adequate notice to the person's then-current lawyer prior to accepting any fee from or on behalf of the incarcerated person.

**Comment**

[1] This rule governs all communications about a lawyer's services, including advertising. It is especially important that statements about a lawyer or the lawyer's services be accurate, since many members of the public lack detailed knowledge of legal matters. Certain advertisements such as those that describe the amount of a damage award, the lawyer's record in obtaining favorable verdicts, or those containing client endorsements, unless suitably qualified, have a capacity to mislead by creating an unjustified expectation that similar results can be obtained for others. Advertisements comparing the lawyer's services with those of other lawyers are false or misleading if the claims made cannot be substantiated.

**Advertising**

[2] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of limited means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition.

[3] This rule permits public dissemination of information concerning a lawyer's name or firm name, address, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[4] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have rules regulating the type and content of advertising by lawyers that go beyond prohibitions against false or misleading statements. Such regulations create unneeded barriers to the flow of information about lawyers' services to persons needing such services, and so this rule subjects advertising by lawyers only to the requirement that it not be false or misleading.

[5] There is no significant distinction between disseminating information and soliciting clients through mass media or through individual personal contact. In-person solicitation (which would include telephone contact but not electronic mail) can, however, create problems because of the particular circumstances in which the solicitation takes place. This rule prohibits in-person solicitation in circumstances or through means that are not conducive to intelligent, rational decisions. Such circumstances and means could be the harassment of early morning or late night telephone calls to a prospective client to solicit legal work, or repeated calls at any time of day, and solicitation of an accident victim or the victim's family shortly after the accident or while the victim is still in medical distress. A lawyer is no longer permitted to conduct in-person solicitation through the use of a paid intermediary, *i.e.,* a person who is neither the lawyer's partner (as defined in Rule 1.0(i)) nor employee (see Rule 5.3) and who is compensated for such services. This prohibition represents a change in Rule 7.1(b), which had previously authorized payments to intermediaries for recommending a lawyer. Experience under the former provision showed it to be unnecessary and subject to abuse. *See* Rules 5.3, 8.4(a), and 8.4(c) regarding a lawyer's responsibility for abusive or deceptive solicitation of a client by the lawyer's employee.

**[6] Rule 7.1(c) does not address fee splitting between two or more firms representing the same client in the same project. Compare Rule 1.5(e). Lawyers must also be aware of their obligation to maintain their professional independence under Rule 5.4.**

**[7] A lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay money or give anything of material value solely for the referral, but the lawyer does not violate paragraph (c) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not**

**restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.**

**Payments for Advertising**

[8] ~~[6]~~ A lawyer is allowed to pay for advertising or marketing permitted by this rule. Likewise, a lawyer may participate in lawyer referral programs and pay the usual fees charged by such programs.

**Solicitations in the Vicinity of the District of Columbia Courthouse**

[9] ~~[7]~~ Paragraph **(e)** ~~(d)~~ is designed to prohibit unseemly solicitations of prospective clients in and around the District of Columbia Courthouse. The words "for a fee paid by or on behalf of a client or under the Criminal Justice Act" have been added to paragraph **(e)** ~~(d)~~ as it was originally promulgated by the District of Columbia Court of Appeals in 1982. The purpose of the addition is to permit solicitation in the District of Columbia Courthouse for the purposes of *pro bono* representation. For the purposes of this rule, *pro bono* representation, whether by individual lawyers or nonprofit organizations, is representation undertaken primarily for purposes other than a fee. That representation includes providing services free of charge for individuals who may be in need of legal assistance and may lack the financial means and sophistication necessary to have alternative sources of aid. Cases where fees are awarded under the Criminal Justice Act do not constitute *pro bono* representation for the purposes of this rule. However, the possibility that fees may be awarded under the Equal Access to Justice Act and Civil Rights Attorneys' Fees Awards Act of 1976, as amended, or other statutory attorney fee statutes, does not prevent representation from constituting *pro bono* representation.

**Solicitations of Inmates**

[10] ~~[8]~~ Paragraph **(f)** ~~(e)~~ is designed to address the vulnerability of incarcerated persons to lawyers seeking fee-paying representations. It applies only to situations where the incarcerated person has not initiated contact with the lawyer. In such situations, the lawyer may have contact with the individual but may not accept a fee unless and until timely notice is provided to current counsel for such incarcerated person.